

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD J. HROBUCHAK, individually	:	No. 3:03cv0591
and t/a HROBUCHAK LAWN AND	:	
GARDEN and LAURIE A. HROBUCHAK,	:	(Judge Munley)
Plaintiffs	:	
	:	
	:	
v.	:	
	:	
NATIONWIDE PROPERTY & CASUALTY:	:	
INSURANCE COMPANY, a/d/b/a	:	
NATIONWIDE INSURANCE COMPANY,	:	
and d/b/a NATIONWIDE MUTUAL	:	
INSURANCE COMPANY,	:	
Defendants	:	

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MEMORANDUM

Before the court for disposition is the plaintiffs' second motion for sanctions.¹ The plaintiffs are Richard J. Hrobuchak, individually and trading as Hrobuchak Lawn and Garden, and Laurie A. Hrobuchak. The defendants are Nationwide Property & Casualty Insurance Company, a/d/b/a Nationwide Insurance Company and d/b/a Nationwide Mutual Insurance Company, (hereinafter referred to collectively as "Nationwide" or "Defendant"). For the reasons that follow, the motion will be granted.

Background

On July 20, 2001, Plaintiff Robert Hrobuchak was involved in an accident that occurred while standing in a trailer that was hitched to a pickup truck. He was attempting to

¹Also before the court are the plaintiffs' third motion for sanctions and first motion for default judgment. As the issues raised in those motions are addressed by this memorandum, they will be denied as moot.

remove a garden tractor from the trailer when he was “suddenly and without warning and without any fault of his own, thrown from the trailer to the ground, landing upon his back and various parts of his body, and suffering injuries therefrom.” Compl. ¶ 10 -11. He suffered the following as a result of the fall: herniated and fragmented discs in his spine; radiating pain including pain into buttocks and legs and foot; impingement upon nerve roots with resulting pain and loss of functions of bodily parts; contusions and scarring; closed head injuries; hand and elbow injuries; and disabling pain accompanied with emotional distress and depression. Compl. ¶ 16. The trailer and the pickup truck were both insured through the defendant insurance company with a commercial insurance policy. Compl. ¶ 4 - 6.

Plaintiffs have sued their insurance carrier, Nationwide, alleging that it is not providing the bargained for wage loss benefits or providing for plaintiff’s medical treatment. Plaintiffs further assert that the defendants’ failure to provide the benefits rises to the level of bad faith. On April 8, 2003, the defendants removed the case to the United States District Court for the Middle District of Pennsylvania. Subsequently, the court set the discovery deadline at January 21, 2004. See Doc. 10, Scheduling order of August 22, 2003. On December 17, 2003, a joint motion for extension of the discovery deadline was filed, and the deadline was extended to February 29, 2004. (Doc. 12, Doc. 14). A second joint motion for extension of the discovery deadline was filed on February 10, 2004, and discovery was extended to March 31, 2004. (Doc. 15, Doc. 17).

The court held a telephonic discovery conference on February 24, 2004 where the

court ordered the defendant to cooperate with the plaintiffs regarding discovery. The parties once again requested an extension of the discovery deadline on March 18, 2003. (Doc. 20). The court granted an extension to April 30, 2004, but noted on the order that no further extensions would be granted. (Doc. 21).

Plaintiffs filed a motion for discovery, to compel and for sanctions on April 9, 2004. The motion indicated that the defendant failed to respond to written interrogatories, had not provided the self-disclosure discovery required by FED. R. CIV. P. 26, and was not cooperating in arranging the deposition of the defendants' personnel. The court held a telephonic conference on these discovery issues on April 14, 2004. The court's ruling at the conference was memorialized in an order issued April 19, 2004, which ordered that the defendant provide all outstanding discovery and provide four witnesses, identified in the plaintiff's motion, for deposition by May 3, 2004. (Doc. 25). Notably, the order further provided that the failure of the defendant to comply with the order would result in the imposition of sanctions. In addition, the discovery deadline was once again extended, this time to June 1, 2004. (Doc. 25).

On May 3, 2004, the plaintiffs filed a motion for sanctions regarding the defendant's violation of the order of April 19, 2004. (Doc. 26). A brief in support of the motion was filed on May 12, 2004. (Doc. 28). The opposition brief was due on May 27, 2004. See L.R. 7.6 (providing parties opposing a motion fifteen days from the filing of the supporting brief within which to file an opposition brief). The defendant filed no response to the motion. A

hearing on the motion was held on June 15, 2004. Defendants' counsel was notified of this hearing via electronic filing notification on June 3, 2004. Nevertheless, counsel for the defendants did not appear at the hearing.

According to the plaintiffs' motion, plaintiffs' counsel attempted several times to schedule the depositions at issue. Defense counsel did not respond to the plaintiff. Finally, plaintiff sent a notice of deposition scheduling the depositions of the employees for April 28, 2004 and April 29, 2004. No one appeared on behalf of the defendants on either date. To date, defendant has not presented the witnesses for deposition or produced requested paper discovery.

At the June 15th hearing, the Plaintiff Laurie A. Hrobuchak testified. She stated that due to the disruption in receiving the benefits at issue, she, her husband and their two children have suffered great financial distress, including an inability to pay property taxes and the threat of mortgage foreclosure.

On June 16, 2004, the court held a hearing on defense counsel's failure to attend the June 15th hearing. Defense counsel appeared at the hearing, and acknowledged that he has failed to properly engage in discovery and to comply with the court's order of April 19, 2004.

Defense counsel provided no excuse for his conduct. The following exchange occurred at the June 16, 2004 hearing:

The Court: Mr. Kelly, in this case, you have entered your appearance, and you're representing the Defendant, Nationwide Insurance Company, is that correct?

Mr. Kelly: That is correct, Your Honor.

The Court: Now, I want to ask you some questions. Firstly, let me ask you this, under Rule 26 of the Federal Rules, certain initial disclosures must be made in every case, of documents and witnesses, and you are required to do that. You failed to do that in this case. Would you explain to me why?

Mr. Kelly: There is no - - we have provided some of the materials, Your Honor, through - -

The Court: Minimum.

Mr. Kelly: Minimum.

The Court: You have not completely satisfied the dictates of Rule 26.

Mr. Kelly: I do not disagree with that, Your Honor.

The Court: In this case, the Plaintiff has filed interrogatories. Under Rule 33, you have 30 days in which to answer or object to interrogatories filed. You have failed to answer the interrogatories. Would you explain why?

Mr. Kelly: There is no particular reason, Your Honor, I can explain. I mean, other than - -

The Court: On February the 24th, we held a discovery conference addressing your failures to participate in discovery, and at that time, you told me on the phone that you had other matters that were pressing against you.

I advised you and directed you that you make this case a priority and directed you to answer the discovery requests in a timely manner, and that still hasn't been done, and you haven't provided discovery to the Plaintiff in this case. Why?

Mr. Kelly: Your Honor, I have no particular reason that I can explain, other than this case just got ahead of me and it kind of became one of those cases. I'm sorry.

The Court: The Court issued a written order on April 19th, 2004, directing you to comply with discovery obligations and provide four witnesses for depositions by May the 3rd, 2004.

You have ignored the Plaintiff's attempt to schedule these depositions, and the Plaintiff has issued, in furtherance of that, notices for depositions on April 28th and April 29th, and neither you, nor the deponents, have appeared. Why?

Mr. Kelly: Again, Your Honor, there is no particular reason, other than I can say the case just got away from me.

The Court: On May the 3rd, the Plaintiff filed a motion for sanctions, and you have never answered that motion. Why?

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Mr. Kelly: [T]here is no particular reason that I can say that I did not.

The Court: On June the 3rd, the Court ordered that a hearing for sanctions be held yesterday, June the 15th. We have the order verified

electronically. It appears you did not appear for the hearing.

Mr. Kelly: That is correct.

The Court: Why?

Mr. Kelly: The only thing I can determine - I went back, after I got a call from your chambers yesterday, and figured out what happened was when the electronic notice comes in, my practice is to hit the print button so that I can get a copy of it and then put it into a folder that I keep on the computer for this case, and either I didn't hit the print button correctly or it didn't print for some reason, and I don't remember specifically, but what often happens is that by the time I get out to the printer, a phone call comes in, and I didn't notice that it didn't print, and it just - - I mean, that is not - -

The Court: Mr. Kelly, in light of your conduct in this case and the history that I have just revealed, that answer is not satisfactory to the Court. (Doc. 37, N.T. June 16, 2004, p. 2 - 5).

After the hearing, we found that the defendants' actions in this case, including the failure to cooperate in discovery with the plaintiff, the failure to follow court orders and the failure to appear at the hearing held on June 15, 2004, merited the award of sanctions under FED. R. CIV. P. 37. We thus ordered the following on June 16, 2004: 1) The Defendants were to respond to all of the plaintiff's written interrogatories in full within five (5) days; 2) The Defendants were to produce the four named witnesses, Anne Clemmons, Temika Stone, Thomas McMahon and Donna Young, and have them available for depositions on dates to be provided by Plaintiffs' counsel, with no more than five business days notice being required; 3) the Defendants were to respond and produce all those documents otherwise identified in Plaintiffs' letter of March 11, 2004 within five (5) business days; 4) The Defendants were to identify any other witnesses with knowledge of the claims of the Plaintiffs within five (5) business days; 5) The Defendants were to pay as a monetary sanction twenty thousand dollars (\$20,000.00) to the plaintiff within ten (10) days; 6) The Defendants were further ordered to

pay the attorney's fees and expenses for plaintiff filing the motion for sanctions and for the depositions which defendants failed to attend. (Doc. 36, Memo. and Order dated June 16, 2004).

We ordered that the plaintiff submit a bill of costs with respect to the attorney's fees, which they did. Id., (Doc. 40, Plaintiffs' Bill of Costs). Thus on July 1, 2004, we ordered the defendants to pay \$14,463.80 in attorney's fees and costs within five (5) days. (Doc. 44) We further granted leave to the plaintiffs to amend their complaint within five (5) days from the date of the order to include defendants' conduct subsequent to the filing of the complaint, as part of the bad faith claim. Plaintiffs filed their amended complaint on June 21, 2004. (Doc. 38).

On June 29, 2004, the plaintiffs filed a second motion for sanctions. In the motion, they assert that the defendants have not complied in any way with our Order of June 16, 2004. (Doc. 41). On June 30, 2004, we ordered the defendants to file a response to the second motion for sanctions by noon on July 6, 2004, or we would consider the motion unopposed and grant sanctions to the plaintiffs.² The defendants never filed a response to the motion. The court scheduled a hearing on the second motion for sanctions to be held on July 15, 2004. All parties were notified of the hearing. Without excuse, defense counsel did not

²Our order provided: "Possible sanctions include, *inter alia*, precluding the defendants from presenting any evidence at trial, granting default judgment in favor of the plaintiff and/or monetary fines." (Doc. 43).

appear at the hearing³ where plaintiffs' counsel confirmed that the defendants have not complied with any of the directives of the court's June 16, 2004 order. (Doc. 53, N.T. July 15, 2004). The second motion for sanctions is now ripe. We find that granting default judgment to the plaintiffs is the appropriate sanction.

Discussion

Rule 37 of the Federal Rules of Civil Procedure provides as follows:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or **rendering a judgment by default** against the disobedient party.

(emphasis added) FED. R. CIV. P. 37(b).

The United States Supreme Court has explained that, "[t]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court. . . not merely to penalize . . . but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976). While default is the most extreme sanction available to the court and should be the sanction of last resort, we find it particularly suitable. Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868-69 (3d Cir. 1984).

³Defense counsel is Robert E. Kelly, Jr. of Kelly, Hoffman and Goduta, Harrisburg, Pennsylvania. All orders from the court are electronically filed and delivered to both Attorney Kelly and Karen S. Coates, Esq., of the same firm.

In the instant case, defendants' actions, or more precisely their inactions, have made it impossible for the plaintiffs to prosecute their action. As noted above, we provided notice to the defendants that if a response to the second motion for sanctions was not filed by July 6, 2004 at noon we would treat it as unopposed and grant sanctions. One of the sanctions that we indicated would be appropriate is the entry of default against the defendants.

In addition to making it impossible for the plaintiffs to prosecute their case, defendants' inaction has caused significant extra work to both plaintiff's counsel and this court. A case that should have been a straightforward declaratory judgment action has been unnecessarily complicated by numerous motions for sanctions and hearings all caused by the defendants' egregious conduct.

Moreover, we have imposed lesser sanctions on the defendants in order to resolve this matter without granting default to the plaintiffs, however, the defendants have ignored those sanctions. Because of defendants failure to comply with discovery orders, their failure to respond to sanctions motions, and its failure to respond to court-ordered lesser sanctions, default judgment has become the sanction of last resort and it shall be imposed against the defendants. A hearing will be held to determine the amount of damages. An appropriate order follows.

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RICHARD J. HROBUCHAK, individually	:	No. 3:03cv0591
and t/a HROBUCHAK LAWN AND	:	
GARDEN and LAURIE A. HROBUCHAK,	:	(Judge Munley)
Plaintiffs	:	
	:	
v.	:	
	:	
NATIONWIDE PROPERTY & CASUALTY:	:	
INSURANCE COMPANY, a/d/b/a	:	
NATIONWIDE INSURANCE COMPANY,	:	
and d/b/a NATIONWIDE MUTUAL	:	
INSURANCE COMPANY,	:	
Defendants	:	

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ORDER

_____ **AND NOW**, to wit, this 20 day of July 2004, the plaintiffs' second motion for sanctions (Doc. 41) is **GRANTED** to the extent that the Clerk of Court is directed to enter default against the defendants. By further order of court, a hearing on the amount of damages will be scheduled. The defendants' third motion for sanctions (Doc. 46) and first motion for default judgment (Doc. 48) are denied as moot as they are resolved by this memorandum and order.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

Filed: 7/20/04